

N. 3025

No. 15431

United States
Court of Appeals
for the Ninth Circuit

HENRY J. ERNST,

Appellant,

vs.

SECRETARY OF THE INTERIOR, SOLICITOR,
DEPARTMENT OF THE INTERIOR
and ROY N. MIKEL,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILE

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PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

MAURICE T. JOHNSON,
Room 316 Chena Bldg.,
Fairbanks, Alaska,

Attorney for Plaintiff and Appellant.

GEORGE M. YEAGER,
U. S. Attorney,
P. O. Box 111,
Fairbanks, Alaska,

Attorney for Defendants, Secretary of
the Interior and Solicitor, Dept. of
Interior, Appellee.

EUGENE V. MILLER,
527 Fourth Ave.,

Attorney for Defendant Roy N. Mikel, Ap-
pellee.

In the District Court for the District of Alaska,
Fourth Division
No. 9303

HENRY J. ERNST,

Plaintiff,

vs.

SECRETARY OF THE INTERIOR, SOLICITOR,
DEPARTMENT OF THE INTERIOR,
ROY N. MIKEL,

Defendants.

COMPLAINT TO REVIEW DECISION OF
SECRETARY OF THE INTERIOR

Now Comes the Plaintiff above named, and for cause of action against the Defendants, complains and alleges, as follows:

I.

Jurisdiction is conferred upon this Court by Title 5, U.S.C.A., Section 1009, that on or about the 7th day of November, 1955, a decision of the acting Director of the Bureau of Land Management was awarded by the Solicitor of the Department of the Interior by and through the Secretary of the Interior, Fairbanks Entry No. 08294. This decision cancelled the Homestead Entry of the Plaintiff and permitted the re-entry by the Defendant, Roy N. Mikel who was the Contestant.

II.

The Plaintiff's original Entry was allowed on August 28, 1951; that the Defendant Roy N. Mikel instituted contest proceedings on August 28, 1952; that during the Summer of 1952 there had been a great deal of rain in the area and the particular

Homestead in question was low and unfilled and as a result was very marshy. That it was difficult to do anything in the way of actual building on the property during that Summer; that the Plaintiff cleared six acres of land, procured gravel for a ramp from the highway to the Homestead building site, drilled a water well on the premises and sunk six concrete piers for footings for the house foundation, and did everything that could be done under the circumstances to establish an actual personal residence.

III.

The Plaintiff desires a review of the entire contest of his entry and requests a hearing before this Court to establish the rights of the Plaintiff in the property for the reason that the decision of the Secretary of the Interior is erroneous and illegal, arbitrary and capricious, and therefore should be set aside.

Wherefore, the Plaintiff prays that the decision of the Secretary of the Interior in Fairbanks No. 08294 decided November 7, 1955, be reviewed in its entirety, and that the said Decision be set aside and declared null and void, and that the original Entry of the Plaintiff be reinstated; and for such other relief as to the Court may seem just in the premises.

/s/ HENRY J. ERNST,
Plaintiff.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed November 5, 1956.

Office, Federal Bldg., at Fairbanks, Alaska, in the said District at 9:15 a.m., on the 6th day of November, 1956.

Marshal's fees \$3.00.

A. F. DORSH,
United States Marshal.

By /s/ ELFRIEDA C. FRANCK,
Deputy.

[Endorsed]: Filed November 6, 1956.

[Title of District Court and Cause.]

SUMMONS

To the aboved-named Defendant:

You are hereby summoned and required to serve upon Maurice T. Johnson, plaintiff's attorney, whose address Room 316 Chena Building, Fairbanks, Alaska, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: Nov. 5, 1956.

[Seal] JOHN B. HALL,
Clerk of Court.

/s/ OLGA T. STEGER,
Chief Deputy Clerk.

Return of Service

United States of America,
4th District of Alaska—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Roy N. Mikel, by handing to and leaving a true and correct copy thereof with Roy N. Mikel personally, at Residence, Garrison Fast Freight Road, at Fairbanks Precinct, Alaska, in the said District at 11:05 a.m., on the 7th day of November, 1956.

Marshal's fees \$3.00.

Mileage \$1.20.

A. F. DORSH,
United States Marshal.

By /s/ ELWYN M. ROBINSON,
Deputy.

[Endorsed]: Filed November 8, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Reta M. Walker, being first duly sworn, on oath deposes and says: That she is employed in the office of Maurice T. Johnson, attorney for the Plaintiff. That on the 6th day of November, 1956, she placed

in the United States mail at the Post Office in Fairbanks, Alaska, an envelope addressed to each of the following:

Attorney General of the United States,
Department of Justice,
Washington, D. C.;

Secretary of the Interior,
Department of the Interior,
Washington, D. C.

Solicitor,
Department of the Interior,
Washington, D. C.

Each said envelope contained a copy of the Complaint to Review Decision of Secretary of the Interior, and the Summons, and carried the requisite amount of postage to insure delivery by registered air mail, return receipt requested.

Further this affiant sayeth not.

/s/ RETA M. WALKER.

Subscribed and sworn to before me this 8th day of November, 1956.

[Seal] /s/ MAURICE T. JOHNSON,
Notary Public in and for
Alaska.

My commission expires 4/17/60.

[Endorsed]: Filed November 28, 1956.

[Title of District Court and Cause.]

MOTION TO QUASH THE RETURN OF SERVICE OF SUMMONS AND TO DISMISS THE COMPLAINT

Comes now the Secretary of the Department of Interior and the Solicitor of the Department of the Interior by and through George M. Yeager, United States Attorney for the Fourth Judicial Division, District of Alaska, and moves this honorable Court for an order quashing the return of service of summons and for an order dismissing the complaint for the reason that these government officials are residents of the District of Columbia and personal actions against these two defendants can only be brought against them in the district of their official domicile. Thus this Court does not have venue as to these two defendants.

Dated at Fairbanks, Alaska, this 27th day of November, 1956.

/s/ GEORGE M. YEAGER,
United States Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 28, 1956.

[Title of District Court and Cause.]

ANSWER

Comes Now Roy N. Mikel, one of the above-named defendants and for his answer admits, denies and alleges as follows:

I.

Denies that jurisdiction is conferred upon this Court by Title 5, but admits that a decision in favor of the contestant was entered.

II.

Not having sufficient information upon which to base a belief, denies the allegations contained in paragraph II.

III.

Denies each and every allegation contained in paragraph III.

Wherefore, the defendant having answered the allegations of the plaintiff, prays that the court dismiss the action and that the plaintiff take nothing thereby as well as that the plaintiff be ordered to pay the defendant's attorney fees and costs incurred herein.

/s/ EUGENE V. MILLER.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Plaintiff in this action seeks a review by this court of a decision of the Secretary of the Interior, acting through the Director of the Bureau of Land Management and the Solicitor of the Department of the Interior, canceling a homestead entry made by him and permitting the re-entry by the defendant Roy N. Mikel, contestant; and praying that said decision be set aside and declared null and void, and that the original entry of the plaintiff be reinstated.

Service of summons and complaint upon the Secretary of the Interior and the Solicitor of the Department of the Interior was made upon the United States Attorney for this District, and copies thereof sent by registered mail to such officials and to the Attorney General of the United States at their official residences in Washington, D.C. Summons and complaint was served upon the defendant Mikel in this District.

The Secretary of the Interior and the Solicitor of the Department of the Interior have appeared specially by the United States Attorney and moved the court for an order quashing the return of service of summons and dismissing the complaint, upon the grounds that these Government officials are residents of the District of Columbia and such action can be brought against them only in the district of their official residence.

Jurisdiction to review such decision could only be conferred by the provisions of Sec. 10 of the Administrative Procedure Act, Title 5, Sec. 1009, U.S.C., upon which plaintiff relies. This statute provides for judicial review of "agency action" of any administrative authority or agency of the United States, which proceeding, in the absence of any specific statute, may be brought "in any court of competent jurisdiction." It is well settled that any action under the provisions of this Act against a public official of the United States in his official capacity can only be maintained at the official residence of such official, within the meaning of Title 28, Sec. 1391, U.S.C.A. *Blackmar vs. Guerre*, 342 U. S. 512, 516; *Trueman Fertilizer Co. vs. Larson* (CCA 5), 196 F. 2d 910; *Nesbitt Fruit Products, Inc. vs. Wallace*, 17 F. Supp. 141; *Torres vs. McGranery*, 111 F. Supp. 241; *Muerer vs. Ryder*, 137 F. Supp. 362; *Clement Martin vs. Dick Corp.*, 97 F. Supp. 961.

Compare *Wilson vs. United States Civil Service Commission*, 136 F. Supp. 104, and *Kansas City Power and Light Co. vs. McKay*, 225 F. 2d 924, where actions to review agency decisions were properly brought in the U. S. District Court for the District of Columbia. In the *Kansas City Power* case the court expressly holds that the Administrative Procedure Act does not of itself establish the jurisdiction of the Federal Courts over an action not otherwise cognizable by them, or does not render competent a court which lacks jurisdiction upon any other ground (p. 933).

As the official residence of the Secretary of the Interior and the Solicitor of the Department of the Interior was and is in the District of Columbia this action cannot be maintained against them in this District. See cases above cited, and Anno. Title 28, Sec. 1391, U.S.C.A., note 49.

Plaintiff cites as authority for this proceeding *Patton vs. Administrator of Civil Aeronautics, et al.* (CCA 9), 217 F. 2d 395, and *May Department Stores vs. Brown*, 60 F. Supp. 735. In both of these cases general appearances were made by the official involved and the question of venue did not arise. Plaintiff also cites other decisions of the Federal courts to the effect that the courts have the power to review administrative discretion or to compel a correction or remedy abuse of discretion, but none of the cases cited involve a review of administrative action as such and in none of these cases is the question of venue raised.

The court does have jurisdiction over the defendant Mikel, who has appeared by answer denying jurisdiction conferred upon this court by Sec. 1009, Title 5. This does not aid the plaintiff for the reason that no relief can possibly be granted against this defendant in these proceedings and that the Secretary and the Solicitor of the Department of the Interior are indispensable parties, and the courts of the District of Columbia are the only courts of "competent jurisdiction" to entertain such suit against them. *Blackmar vs. Guerre, supra*; *Muerer vs. Ryder, supra*.

The motion is granted, and an order lodged by the United States Attorney quashing the return of service of summons upon the officials mentioned and dismissing the complaint and said action is entered accordingly, which order will be without prejudice to the right of the plaintiff to bring such action in the proper forum.

Dated at Fairbanks, Alaska, this 28th day of December, 1956.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

ORDER TO QUASH THE RETURN OF SERVICE OF SUMMONS AND TO DISMISS THE COMPLAINT

This matter coming on regularly for hearing this 7th day of December, 1956, upon the motion of George M. Yeager, United States Attorney, for an order to quash the return of service of summons and to dismiss the complaint for the reason that these government officials are residents of the District of Columbia and personal actions against these two defendants can only be brought against them in the district of their official domicile; and the Court being fully advised in the matter,

Now, Therefore, It Is Ordered that the return of service of summons is hereby quashed, and the com-

plaint in this matter is hereby dismissed, and said cause of action is dismissed.

Done at Fairbanks, Alaska, this 28th day of December, 1956.

/s/ WALTER H. HODGE,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 28, 1956.

Entered December 28, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Plaintiff above named hereby appears to the United States Court of Appeals for the Ninth Circuit from the Order quashing the return of service of summons and dismissing the action entered in the above-entitled case on the 28th day of December, 1956.

Dated at Fairbanks, Alaska, this 25th day of January, 1957.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 25, 1957.

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents :

That we, Henry J. Ernst, Plaintiff, as Principal, and \$250.00 in cash deposited with the Clerk of Court, as Sureties, are held and firmly bound unto Secretary of the Interior, Solicitor, Department of the Interior, and Roy N. Mikel, Defendants, in the full and just sum of \$250.00, to be paid to the said Secretary of the Interior, Solicitor, Department of the Interior, and Roy N. Mikel, Defendants, certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of February, 1957.

Whereas, lately at a District Court of the United States for the District of Alaska, Fourth Judicial Division, in a suit pending in said Court, between the Plaintiff above named and the Defendants above named, an Order quashing the return of service of summons and dismissing the action was rendered against the Plaintiff, and the said Plaintiff having filed in said Court a Notice of Appeal to reverse the Order in the aforesaid suit on appeal to United States Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Plaintiff above named shall

prosecute his appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal] /s/ HENRY J. ERNST,
Principal, Plaintiff.

\$250.00 in cash deposited with the Clerk of the Court, Sureties.

Acknowledged before me the day and year first above written.

[Seal] /s/ IRENE D. BODDY,
Notary Public in and for
Alaska.

My commission expires 1/4/58.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Pursuant to the provisions of the Federal Rules of Civil Procedure and of the United States Court of Appeals for the Ninth Circuit, the Appellant herewith states the points on which he intends to rely, in this appeal, as follows:

1. The Trial Court erred in granting the motion to quash the return of service of summons and to dismiss the complaint and the action, which motion had been filed by the Defendants, the Secretary of the Interior, and the Solicitor General, Department of the Interior, through the United States Attorney, Fourth Division, District of Alaska.

Dated at Fairbanks, Alaska, this 6th day of February, 1957.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all of the proceedings in this cause listed on the Designation of Record on Appeal of the Plaintiff and Appellant, viz:

1. Plaintiff's Complaint.
2. Summons and Return showing Service on the Secretary of Interior and Solicitor of the Department of the Interior through U. S. Attorney.
3. Summons and Return Showing Service on Defendant Roy N. Mikel.
4. Affidavit of Mailing filed, November 28, 1956.

